

SCOTT A. SMITH, )  
 )  
 Plaintiff, ) No. CV-10-0003-CI  
 )  
 v. ) ORDER DENYING PLAINTIFF'S  
 ) MOTION FOR SUMMARY JUDGMENT  
 ) AND GRANTING DEFENDANT'S  
 MICHAEL J. ASTRUE, Commissioner ) MOTION FOR SUMMARY JUDGMENT  
 of Social Security, )  
 )  
 Defendant. )  
 )

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 14, 19.) Attorney Maureen J. Rosette represents Scott Smith (Plaintiff); Special Assistant United States Attorney Willy M. Le represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

Plaintiff protectively filed for disability insurance benefits (DIB) and Supplemental Security Income (SSI) on September 16, 2006. (Tr. 104.) He alleged disability due to hepatitis C, cirrhosis, chronic low back pain, blood clot in his left leg, chronic fatigue, back pain, and knee pain with an onset date of March 1, 2005. (Tr. 108.) Benefits were denied initially and on reconsideration.

1 Plaintiff timely requested a hearing before an administrative law  
2 judge (ALJ), which was held before ALJ R. S. Chester on September  
3 18, 2008. (Tr. 27-56.) Plaintiff, who was represented by counsel,  
4 and vocational expert Deborah LaPoint (VE) testified. The ALJ  
5 denied benefits on October 15, 2008, and the Appeals Council denied  
6 review. (Tr. 1-3, 9-26.) The instant matter is before this court  
7 pursuant to 42 U.S.C. § 405(g).

#### 8 STANDARD OF REVIEW

9 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
10 court set out the standard of review:

11 A district court's order upholding the Commissioner's  
12 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
13 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
14 Commissioner may be reversed only if it is not supported  
15 by substantial evidence or if it is based on legal error.  
16 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
17 Substantial evidence is defined as being more than a mere  
18 scintilla, but less than a preponderance. *Id.* at 1098.  
19 Put another way, substantial evidence is such relevant  
20 evidence as a reasonable mind might accept as adequate to  
21 support a conclusion. *Richardson v. Perales*, 402 U.S.  
22 389, 401 (1971). If the evidence is susceptible to more  
23 than one rational interpretation, the court may not  
24 substitute its judgment for that of the Commissioner.  
25 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*  
26 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

27 The ALJ is responsible for determining credibility,  
28 resolving conflicts in medical testimony, and resolving  
ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
Cir. 1995). The ALJ's determinations of law are reviewed  
*de novo*, although deference is owed to a reasonable  
construction of the applicable statutes. *McNatt v. Apfel*,  
201 F.3d 1084, 1087 (9th Cir. 2000).

29 It is the role of the trier of fact, not this court, to resolve  
30 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
31 supports more than one rational interpretation, the court may not  
32 substitute its judgment for that of the Commissioner. *Tackett*, 180

1 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
2 Nevertheless, a decision supported by substantial evidence will  
3 still be set aside if the proper legal standards were not applied in  
4 weighing the evidence and making the decision. *Browner v. Secretary*  
5 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If  
6 there is substantial evidence to support the administrative  
7 findings, or if there is conflicting evidence that will support a  
8 finding of either disability or non-disability, the finding of the  
9 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
10 1230 (9<sup>th</sup> Cir. 1987).

#### 11 SEQUENTIAL EVALUATION

12 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
13 requirements necessary to establish disability:

14 Under the Social Security Act, individuals who are  
15 "under a disability" are eligible to receive benefits. 42  
16 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
17 medically determinable physical or mental impairment"  
18 which prevents one from engaging "in any substantial  
19 gainful activity" and is expected to result in death or  
20 last "for a continuous period of not less than 12 months."  
21 42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
22 from "anatomical, physiological, or psychological  
23 abnormalities which are demonstrable by medically  
24 acceptable clinical and laboratory diagnostic techniques."  
25 42 U.S.C. § 423(d)(3). The Act also provides that a  
26 claimant will be eligible for benefits only if his  
27 impairments "are of such severity that he is not only  
28 unable to do his previous work but cannot, considering his  
age, education and work experience, engage in any other  
kind of substantial gainful work which exists in the  
national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,  
the definition of disability consists of both medical and  
vocational components.

In evaluating whether a claimant suffers from a  
disability, an ALJ must apply a five-step sequential  
inquiry addressing both components of the definition,  
until a question is answered affirmatively or negatively  
in such a way that an ultimate determination can be made.  
20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
claimant bears the burden of proving that [s]he is

1 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
2 1999). This requires the presentation of "complete and  
3 detailed objective medical reports of h[is] condition from  
4 licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
5 404.1512(a)-(b), 404.1513(d)).

6 The Commissioner has established a five-step sequential  
7 evaluation process for determining whether a person is disabled. 20  
8 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.  
9 137, 140-42 (1987). In steps one through four, the burden of proof  
10 rests upon the claimant to establish a prima facie case of  
11 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d  
12 920, 921 (9<sup>th</sup> Cir. 1971). This burden is met once a claimant  
13 establishes that a physical or mental impairment prevents him from  
14 engaging in his previous occupation. 20 C.F.R. §§ 404.1520(a),  
15 416.920(a). At step five, the burden shifts to the Commissioner to  
16 show that (1) the claimant can perform other substantial gainful  
17 activity; and (2) a "significant number of jobs exist in the  
18 national economy" which claimant can perform. 20 C.F.R. §§  
19 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496,  
20 1498 (9<sup>th</sup> Cir. 1984).

#### 21 **STATEMENT OF THE CASE**

22 The facts of the case are set forth in detail in the transcript  
23 of proceedings and are briefly summarized here. At the time of the  
24 hearing, Plaintiff was 55 years old, divorced with two grown  
25 children, and living alone in a mobile home. (Tr. 34.) Plaintiff  
26 testified he had a driver's license and was able to drive but needed  
27 to stop and walk around due to back pain. (Tr. 34-35.) He had an  
28 11<sup>th</sup> grade education and obtained his high school equivalency degree.  
(Tr. 35.) Plaintiff had a long work history as an asphalt truck

1 driver. (Tr. 38-39, 109.) Over the years, Plaintiff has been  
2 treated for a broken leg, a blood clot in his leg, chronic  
3 obstructive pulmonary dysfunction, depression, cirrhosis and liver  
4 failure due to alcohol abuse, deep vein thrombosis (DVT) and  
5 cellulitis. (Tr. 17-18.) He testified he could no longer work due  
6 to chronic low back pain and hepatitis C treatment, which started in  
7 November or December of 2006. (Tr. 36-37.)

8 **ADMINISTRATIVE DECISION**

9 ALJ Chester found Plaintiff's date of last insured for DIB  
10 purposes was March 31, 2005. (Tr. 17.) At step one of the  
11 sequential evaluation, the ALJ found Plaintiff had not engaged in  
12 substantial gainful activity since the alleged onset date. (Tr.  
13 18.) At step two, he found Plaintiff had severe impairments of  
14 "degenerative disk disease, hepatitis C, cirrhosis, and chronic  
15 obstructive pulmonary dysfunction." (*Id.*) He found non-severe  
16 impairments of depression, blood clot, DVT, broken leg, diabetes  
17 mellitus, and arthritis. (Tr. 17-18.) At step three, he found  
18 Plaintiff's impairments, alone and in combination, did not meet or  
19 medically equal one of the listed impairments in 20 C.F.R., Appendix  
20 1, Subpart P, Regulations No. 4 (Listings). (Tr. 18.) At step  
21 four, the ALJ found prior to August 1, 2006, Plaintiff could perform  
22 light work with several non-exertional physical limitations, but  
23 could not perform his past work as a tractor trailer truck driver.  
24 (Tr. 19.) He then found that after August 1, 2006, Plaintiff had  
25 the residual functional capacity (RFC) to perform less than the full  
26 range of sedentary work, and could no longer perform his past work  
27 as a tractor trailer truck driver. (Tr. 23, 24.) At step five,

1 based on the RFC determinations and VE testimony, the ALJ concluded  
2 that, between the alleged onset date, March 1, 2005, and August 1,  
3 2006, Plaintiff could perform other light level work in the  
4 national economy such as deliverer of car rentals and a chauffeur.  
5 (Tr. 25.) However, after August 1, 2006, there was not a  
6 significant number of jobs Plaintiff could perform. Therefore,  
7 Plaintiff was disabled as defined by the Social Security Act from  
8 August 1, 2006, through the date of the ALJ's decision. (Tr. 25-  
9 26.)

#### 10 ISSUES

11 The question is whether the ALJ's decision is supported by  
12 substantial evidence and free of legal error. Plaintiff contends  
13 the ALJ erred in finding he could perform light work between March  
14 1, 2005, through August 1, 2006. Specifically, he argues the ALJ  
15 improperly rejected his treating physician's opinions that he was  
16 unable to work in March 2005 and limited to sedentary activities  
17 after September 2005. (Ct. Rec. 15 at 10.) He further argues his  
18 treating physician's opinions should be credited, therefore  
19 entitling him to DIB benefits from his alleged onset date. (Ct.  
20 Rec. 15 at 12.)

#### 21 DISCUSSION

22 In disability proceedings, a treating physician's opinion  
23 carries more weight than an examining physician's, and an examining  
24 physician's opinion carries more weight than a non-examining  
25 reviewing or consulting physician's opinion. *Benecke v. Barnhart*,  
26 379 F.3d 587, 592 (9<sup>th</sup> Cir. 2004); *Lester v. Chater*, 81 F.3d 821,  
27 830 (9<sup>th</sup> Cir. 1995). The Commissioner must provide "clear and  
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1 convincing" reasons for rejecting the uncontradicted opinion of a  
2 treating or examining physician. *Lester*, 81 F.3d at 830. If the  
3 medical opinion is contradicted, it can only be rejected for  
4 specific and legitimate reasons that are supported by substantial  
5 evidence in the record. *Andrews*, 53 F.3d at 1043. "The ALJ can  
6 meet this burden by setting out a detailed and thorough summary of  
7 the facts and conflicting clinical evidence, stating his  
8 interpretation thereof, and making findings." *Magallanes v. Bowen*,  
9 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989)(quoting *Cotton v. Bowen*, 799 F.2d  
10 1403, 1408 (9<sup>th</sup> Cir. 1986)).

11 State agency physicians who review medical records and opine  
12 regarding a claimant's functional capacity are treated as expert  
13 non-examining sources in disability proceedings. The ALJ may not  
14 ignore these opinions and must explain the weight given. SSR 96-6p.  
15 The opinion of a non-examining medical expert or state agency  
16 consultant by itself cannot be considered substantial evidence that  
17 supports the rejection of a treating or examining physician.  
18 *Lester*, 81 F.3d at 831. However, the opinions of non-examining  
19 reviewing doctors may serve as substantial evidence when supported  
20 by and consistent with other evidence in the record. *Andrews*, 53  
21 F.3d at 1041.

22 Historically, the courts have recognized conflicting medical  
23 evidence, the absence of regular medical treatment during the  
24 alleged period of disability, and the lack of medical support for  
25 doctors' reports based substantially on a claimant's subjective  
26 complaints of pain as "specific," "legitimate" reasons for  
27 disregarding a treating or examining physician's opinion. *Flaten v.*  
28

1 *Secretary of Health and Human Servs.*, 44 F.3d 1453, 1463-64 (9<sup>th</sup> Cir.  
2 1995); *Fair v. Bowen*, 885 F.2d 597, 604 (9<sup>th</sup> Cir. 1989). Rejection  
3 of an examining medical source opinion is specific and legitimate  
4 where the ALJ finds a medical opinion is not supported by the  
5 medical source's own records and/or objective data. *Tommasetti v.*  
6 *Astrue*, 533 F.3d 1035 (9<sup>th</sup> Cir. 2008).

7 To warrant controlling weight, a treating medical source  
8 opinion must be well-supported and consistent with other medical  
9 evidence in the record. 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2).  
10 Although a treating source opinion must always be considered by the  
11 ALJ, and his reasoning must meet legal standards and be supported by  
12 substantial evidence, in disability proceedings the final  
13 determination of a claimant's ability to perform work is the  
14 province of the ALJ. *Richardson*, 402 U.S. at 400. An ALJ is not  
15 bound by a treating source opinion on the ultimate question of a  
16 claimant's ability to perform work-related tasks. 20 C.F.R. §§  
17 404.1527(e)(2) and (3), 416.927(e)(2) and (3).

18 Here, Plaintiff argues the ALJ did not give legally sufficient  
19 reasons for rejecting findings in the three physical evaluation  
20 forms completed by his treating physician, Maja Zucek, M.D., of the  
21 Chewelah Community Health Center. He appears to argue Dr. Zucek's  
22 opinions should have been given controlling weight in the final RFC  
23 determination for the period between March 2005 and August 1, 2006.

24 The record shows that on March 9, 2005, upon referral from Dr.  
25 Zucek, Plaintiff was hospitalized after presenting with swelling in  
26 his legs and abdomen. (Tr. 164.) He was diagnosed with chronic  
27 liver disease, cellulitis, and aggravation of his cirrhosis by  
28



1 resumed alcohol consumption against medical advice. (Tr. 162-63,  
2 166, 303.) Plaintiff's treating gastroenterologist, Dr. Michael  
3 Dixon, opined hepatitis C treatment was not urgent and "should not  
4 be considered until his cellulitis is cleared up." (Tr. 163.)

5 On March 9, 2005, treating physician Dr. Zugec concluded  
6 Plaintiff was severely limited in his ability to work, and would be  
7 this limited for six months. (Tr. 287-88.) By September 2, 2005,  
8 however, Plaintiff had improved with medication, diet and exercise.  
9 In September 2005, Dr. Zugec concluded Plaintiff was restricted to  
10 sedentary work due to liver cirrhosis, DVT and chronic low back  
11 pain. (Tr. 302.)

12 In his assessment of these medical opinions, ALJ Chester gave  
13 little weight to Dr. Zugec's opinions regarding Plaintiff's ability  
14 to work. He reasoned that although the record supports Dr. Zugec's  
15 finding that Plaintiff was severely limited in March 2005, it was  
16 because Plaintiff was hospitalized at the time for liver failure,  
17 DVT and cellulitis. However, he found Plaintiff had recovered  
18 significantly during the six days he was hospitalized and the  
19 severely limiting symptoms identified by Dr. Zugec in March 2005 did  
20 not persist 12 months. (Tr. 17, 23.) Therefore, Plaintiff's  
21 severely limited condition did not meet the durational requirement  
22 to establish disability.<sup>1</sup> (Tr. 19, 23.) The ALJ's reason for  
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24  
25 <sup>1</sup> For a severe impairment to be disabling, the impairment must  
26 render a claimant unable to perform work for a continuous period of  
27 not less than 12 months. 20 C.F.R. §§ 404.1505, 416.905. Duration  
28 is evidenced by medical records that document all pertinent

1 rejecting the March 2005 opinion as a basis for a finding of  
2 disability is specific and legitimate, and supported by Dr. Zugec's  
3 clinic notes and other evidence in the record. SSR 82-52.

4 Although the Commissioner is required to give specific, legally  
5 sufficient reasons for rejecting a treating physician's opinions,  
6 case law does not require a specific recitation in the  
7 administrative findings. The court may draw specific and legitimate  
8 inferences from the ALJ's summary of the evidence, his  
9 interpretation and findings, if reasonable inferences are there to  
10 be drawn. *Batson v. Comm'r of Soc. Sec. Admin*, 359 F.3d 1190, 1193  
11 (9<sup>th</sup> Cir. 2004); *Magallanes v. Bowen*, 881 F.2d 747, 755 (9<sup>th</sup> Cir.  
12 1989). In ALJ Chester's summary of the medical evidence (Tr. 17-18,  
13 21), he specifically noted that evidence prior to August 2006,  
14 included an "unremarkable" MRI of Plaintiff's back, beneficial  
15 physical therapy for his back in August 2005, and Plaintiff's self  
16 reports of little to no pain in his back after resuming his exercise  
17 regime. (Tr. 21.) The court can reasonably infer that this  
18 objective medical evidence does not support the severity opined in  
19 Dr. Zugec's September 2005 physical evaluation form.

20 The ALJ also noted physician reports of asymptomatic hepatitis  
21 C prior to interferon treatment, which began in August 2006. (Tr.  
22 21, 162-63, 166, 200.) He summarized information in the clinic  
23 notes accompanying Dr. Zugec's rejected opinions and other medical  
24 records that are not consistent with Dr. Zugec's severity ratings.

25 \_\_\_\_\_  
26 symptoms, signs and laboratory findings as well as prescribed  
27 treatment, and the response to treatment in terms of changes in  
28 symptoms. SSR 82-52 (*Documentation*).

1 (Tr. 18, 21-22, 289-310.) His specific findings create reasonable  
2 inferences that establish specific and legitimate reasons for  
3 discounting Dr. Zugec's conclusion that Plaintiff was limited to  
4 sedentary work.

5 For example, in her August 2005 clinic notes, Dr. Zugec  
6 reported Plaintiff was seen for low back pain, but he was not taking  
7 anything for the pain. At that time, Dr. Zugec referred Plaintiff  
8 to physical therapy for his back and advised him to cut down on his  
9 fluid intake due to his liver cirrhosis history. (Tr. 294.) As  
10 summarized by the ALJ, physical therapy notes indicated improved  
11 lumbar strength and mobility, with a strength rating of 5/5 by  
12 September 22, 2005. (Tr. 21, 277-79.) By September 26, 2005,  
13 according to physical therapy notes, Plaintiff was reporting no  
14 lower back pain. (Tr. 21, 277.) The ALJ also referenced clinic  
15 notes from October 2005 (seven months after his alleged onset date),  
16 in which Dr. Zugec reported Plaintiff's DVT seemed to be resolved,  
17 and she was discontinuing medication. (Tr. 305-06.) On November  
18 28, 2005, she noted that Plaintiff reported no back pain, no chest  
19 pain, and no leg pain. (Tr. 306.) Nonetheless, she rated these  
20 conditions as "marked" and low back pain as "moderate" in her  
21 September and August evaluation forms. Without further explanation,  
22 she opined Plaintiff was restricted to sedentary level work.<sup>2</sup> (Tr.  
23 302.)

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24  
25 <sup>2</sup> In the evaluation form, sedentary level is defined as the  
26 "ability to lift 10 pounds maximum and frequently lift and/or carry  
27 such articles as files and small tools. A sedentary job may require  
28 sitting, walking and standing for brief periods." (Tr. 302.)

1 Clinic notes also indicate that although Plaintiff reported no  
2 symptoms of hepatitis or cirrhosis to Dr. Zugec in September 2005,  
3 Dr. Zugec stated Plaintiff was unable to work because of chronic  
4 liver cirrhosis. (Tr. 303.) An ALJ is not obliged to credit  
5 opinions that are unsupported by the record as a whole. Further a  
6 finding that a physician's opinion is inconsistent with her own  
7 treatment notes is a "clear and convincing" reason to discount a  
8 medical opinion. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9<sup>th</sup> Cir.  
9 2005). The ALJ did not err in discounting Dr. Zugec's conclusory,  
10 unexplained opinion that Plaintiff was limited to sedentary work  
11 after September 2005. *Batson*, 359 F.3d at 1195. The ALJ's  
12 discussion of the evidence supports his finding that Plaintiff's  
13 inability to perform light work between March 2005 and August 1,  
14 2006, did not meet the durational requirement. Therefore, Plaintiff  
15 was not disabled during this time and was not eligible for DIB.

16 While the record may contain evidence to support Plaintiff's  
17 interpretation and assertions, the ALJ's explanation for rejecting  
18 Dr. Zugec's conclusory opinion that Plaintiff was limited to  
19 sedentary work from September 9, 2005, through August 2006, is a  
20 reasonable interpretation of the evidence in its entirety. *Verduzco*  
21 *v. Apfel*, 188 F.3d 1087, 1089 (9<sup>th</sup> Cir. 1999). Where substantial  
22 evidence supports the Commissioner's decision, the court may not  
23 substitute its judgment for that of the Commissioner. *Id.* Further,  
24 the final determination of regarding Plaintiff's ability to perform  
25 work is the sole responsibility of the Commissioner, 20 C.F.R. §§  
26 404.1516, 416.946, and no special significance may be given to a  
27 medical source opinion on this issue reserved to the Commissioner.

20 C.F.R. §§ 404.1527, 416.927(e). Where, as here, substantial relevant evidence supports the ALJ's final RFC determination, it may not be disturbed. Accordingly,

**IT IS ORDERED:**

1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is **DENIED**;

2. Defendant's Motion for Summary Judgment (**Ct. Rec. 19**) is **GRANTED**.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant, and the file shall be **CLOSED**.

DATED February 3, 2011.

S/ CYNTHIA IMBROGNO  
UNITED STATES MAGISTRATE JUDGE